Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1075

LeBEOUF BROS. TOWING CO., INC. AND T/B CTCO-186-20 AND T/B CTCO-185, THEIR TACKLE, APPAREL, FURNITURE, ETC.
Petitioners

versus

UNITED STATES OF AMERICA
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	PAGE NO.
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	7
REASONS FOR ALLOWING THE WRIT	9
CONCLUSION	15
CERTIFICATE OF SERVICE	15
APPENDIX A (OPINION OF THE COURT OF APPEALS)	A-1
APPENDIX B (JUDGMENT OF COURT OF APPEALS IN UNITED STATES OF AMERICA V. LeBEOUF BROS. TOWING CO., INC.)	A-12
APPENDIX C (JUDGMENT OF COURT OF APPEALS IN UNITED STATES OF AMERICA V. T/B CTCO-186-20)	A-14
APPENDIX D (COURT OF APPEALS DENIAL OF REHEARING)	A-16
APPENDIX E (OPINION OF DISTRICT COURT IN UNITED STATES OF AMERICA V. LeBEOUF BROS. TOWING CO., INC.)	A-18

SUBJECT INDEX (Continued)

PAGE NO.

APPENDIX F (OPINION OF DISTRICT COURT IN UNITED STATES OF AMERICA V. T/B CTCO-186-20) A-43

APPENDIX G (FINAL DECREE OF DISTRICT COURT IN T/B CTCO-186-20) A-57

TABLE OF CASES

PAGE NO.

Boyd v. United States,
116 U.S. 616, 6 S.Ct. 524 (1886) 14

Galvin v. Press,
347 U.S. 522, 74 S.Ct. 737 (1954) 12

Grosso v. United States,
390 U.S. 62, 88 S.Ct. 709 (1968) 14

Howard v. United States,
372 F. 2d 294 (9th Cir. 1967), Cert. Den.
388 U.S. 915, 87 S.Ct. 2129 (1967) 12

Kennedy v. Mendoza-Martinez,
372 U.S. 144, 83 S.Ct. 554 (1963) 12, 13

Lees v. United States,
150 U.S. 476, 14 S. Ct. 163 (1893). 14

Lipke v. Lederer,
259 U.S. 557, 42 S. Ct. 549 (1922). 13

Marchetti v. United States,
390 U.S. 39, 88 S. Ct. 697 (1968). 14

Trop v. Dulles,
256 U.S. 86, 78 S. Ct. 590 (1958). 13

United States v. Constantine,
296 U.S. 287, 56 S. Ct. 223 (1935). 13

United States v. LeBeouf Bros. Towing Co., Inc., 537 F.2d 149 (5th Cir. 1976) 1, 13

TABLE OF CASES (Continued)

	PAGE NO.
United States v. LeBeouf Bros. Towing Co., Inc., 377 F. Supp. 558 (E.D. La. 1974).....	2, 9
United States v. Mobil Oil Corporation, 464 F. 2d 1124 (5th Cir. 1972).....	9,13,14
United States v. United States Coin and Currency, 401 U.S. 715, 91 S.Ct. 1041 (1971)..	14

CONSTITUTION

U.S.C.A. Const. Amend. IV.....	3
U.S.C.A. Const. Amend. V	3
U.S.C.A. Const. Amend. XIV §1.....	3

STATUTES

28 U.S.C. §46	8
28 U.S.C. §1254 (1)	2
33 U.S.C. §407	3,5,8,9,10
33 U.S.C. §411	5, 9
33 U.S.C. §412	3,5,8,9 10, 11
33 U.S.C. §1321 (b) (5)	4,7,8,10
33 U.S.C. §1321 (b) (6)	4,7,9,10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

LeBEOUF BROS. TOWING CO., INC. AND T/B CTCO-186-20 AND T/B CTCO-185 THEIR TACKLE, APPAREL, FURNITURE, ETC.
Petitioners

versus

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, LeBeouf Bros. Towing Co., Inc. and the tank barges CTCO-186-20 & CTCO-185, their tackle, apparel, furniture, etc., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on August 16, 1976, rehearing denied October 12, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals in these consolidated cases is reported at 537 F. 2d 149, and it appears herein at Appendix A, p. A-1; the judgments appear respectively at Appendices B and C, p. A-12 and A-14. The order of the Fifth Circuit denying the application for rehearing was entered on October 12,1976 and appears herein at Appendix D,p. A-16.The decision of the United States District Court for the

Eastern District of Louisiana in *LeBeouf*, rendered on June 14, 1974, reported at 377 F. Supp. 558, appears at Appendix E, p. A-18. The decision of the United States District Court for the Southern District of Texas, Houston Division, an unreported decision in the *T/B CTCO-186-20* case, rendered on March 21, 1974, appears at Appendix F, p. A-43, and the final decree of that Court entered on May 16, 1974, appears at Appendix G, p. A-57.

JURISDICTION

The opinion and judgments of the United States Court of Appeals for the Fifth Circuit were entered on August 16, 1976, and the order denying the request for rehearing was entered on October 12, 1976. This petition for certiorari was filed less than ninety days from the aforesaid date of denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

1. May Congress constitutionally require a vessel owner or operator to report an oil spill, under threat of criminal prosecution, and then impose a mandatory fine?

2. Whether that mandatory fine imposed by the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(6), is a "civil" or "criminal" penalty?

3. Whether the immunity from prosecution provided by the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (b)(5), applies to that mandatory fine of the Act?

4. Whether a penalty may be imposed upon a vessel *in rem* under the Refuse Act, 33 U.S.C. § 407, 412, when the vessel owner or operator is immune from penalties under that Act?

5. Whether actions for civil penalties under the Federal Water Pollution Control Act and the Refuse Act are "criminal in nature" for purposes of the Fifth Amendment and therefore within the scope of the immunity provision of the Federal Water Pollution Control Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

> ". . .nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Constitution of the United States, Amendment XIV, Sec. 1:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Water Pollution Control Act, as amended, (F.W.P.C.A.) § 311(b)(5), 33 U.S.C. § 1161(b)(4), now 33 U.S.C. § 1321(b)(5):

> "Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the approprirate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

Water Pollution Control Act, as amended, (F.W.P.C.A.) § 311(b) (6), 33 U.S.C. § 1321(b) (6):

> "Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating or not more than $5,000 for each offense... In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. . ."

Rivers and Harbors Appropriation Act of 1899 (The Refuse Act) 33 U.S.C. § 407:

> "it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water;. . . .:

Rivers and Harbors Appropriation Act of 1899 (The Refuse Act) 33 U.S.C. §411:

> "Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of Sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or

persons giving information which shall lead to conviction."

Rivers and Harbors Appropriation Act of 1899 (The Refuse Act) 33 U.S.C. § 412:

"Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of

the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

STATEMENT OF THE CASE

These two cases, which were consolidated on appeal to the Fifth Circuit Court of Appeals, involve no factual disputes. Petitioner, LeBeouf Bros. Towing Co., Inc., was the owner of a barge from which a quantity of gasoline spilled into the navigable waters of the United States. As required by § 311(b)(5) of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(5),[1] the spill was reported to the Coast Guard, after which the Coast Guard employed the knowledge gained by that reporting to assess a $2,500 penalty under another section of the Water Pollution Control Act, §311 (b) (6), 33 U.S.C. §1321(b) (6). The Government's suit to recover the penalty in the United States District Court for the Eastern District of Louisiana was dismissed on LeBeouf's motion for summary judgment. The district court held that the penalty sought to be imposed under §311(b) (6), though denominated "civil" was, in fact, a "criminal" sanction and that imposition of the fine was barred by the immunity provision of the FWPCA, 33 U.S.C. §1321(b) (5).

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1. The *LeBeouf* case actually arose under § 11(b) (4) of the Water Quality Improvement Act of 1970, 33 U.S.C. § 1161 (b) (5), which was amended in 1972, prior to the CTCO spill, but since the 1972 amendments were irrelevant to these cases, references are to the Federal Water Pollution Control Act (FWPCA) for purposes of clarity and brevity.

In the T/B CTCO-186-20 case, a quantity of oil spilled from the barge, owned by Cenac Towing Co., Inc. The Coast Guard was immediately notified by an agent of Cenac Towing, and, using the information obtained from the compulsory reporting of the incident, the Government sought to recover a maximum fine of $2,500 under the Refuse Act, 33 U.S.C. § § 407, 412. The Government tacitly conceded that the owner of the CTCO-186-20, Cenac Towing Co., Inc., was entitled to immunity from criminal prosecution pursuant to the immunity provisions of the FWPCA, 33 U.S.C. § 1321 (b) (5). Seeking to circumvent that immunity the Government proceeded *In rem* against the barge CTCO-186-20 on the theory that while the owner of the barge may have obtained immunity, the barge itself had no such immunity. After a trial on the merits the United States District Court for the Southern District of Texas granted judgment in favor of T/B CTCO-186-20, holding that 33 U.S.C. § 412 is "arguably a criminal case for constitutional purposes." Appendix F at p. A-51. The court further held that when the incentive function of the immunity provision is taken into consideration it is probable that Congress intended to grant immunity from *in rem* actions for penalties, regardless of whether they were traditionally classified as Fifth Amendment criminal cases.

In the Fifth Circuit the cases were decided by a quorum of two judges, pursuant to 28 U.S.C. § 46. That Court reversed the two lower courts, holding that the penalties were "civil" because in the *LeBeouf* case, the FWPCA said they were civil and because in the *CTCO-186-20* case, actions for forfeitures have traditionally been considered civil proceedings. The court correctly observed that the nature of the penalties, whether criminal or civil, would be of great importance if the defendants were individuals. Yet despite its own holding that under the FWPCA corporations are entitled to

the same immunity as individuals,[2] the lower court refused to examine the nature of the penalties. Thus the lower court did not determine whether the immunity provided by the Act meets minimum constitutional requirements.

REASONS FOR ALLOWING THE WRIT

1. THE STATUTORY SCHEME REQUIRING A VESSEL OWNER TO REPORT OIL SPILLS, UNDER THREAT OF CRIMINAL PROSECUTION AND THEN IMPOSING A MANDATORY FINE IS GROSSLY UNFAIR, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The applicable provisions of the FWPCA constitute *sui generis* legislation. As indicated by Judge Gordon in the *LeBeouf* opinion, Appendix E at A-34 (377 F. Supp. at 566), this is the only instance in which the Government has coupled a punitive sanction, labeled a "civil penalty", with a mandatory and criminally enforceable requirement of self-reporting. Regardless of whether the penalty provided by 33 U.S. C. §1321(b) (6) is considered criminal or remedial, it is so unfair as to be constitutionally impermissible.

When the provisions of the FWPCA are considered in context with the Refuse Act and the narrow scope of the immunity provision of the FWPCA, as found by the lower court, the unfairness becomes even more apparent. When a spill occurs, a vessel owner becomes liable for criminal penalties under the Refuse Act. 33 U.S.C. §§ 407, 411, 412. The vessel owner is also liable for additional criminal penalties for failure to report the spill to the Coast Guard under the

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2. *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972).

provisions of 33 U.S.C. §1321(b) (5). If the vessel operator does report the spill, under the lower court's holding he is granted a limited form of statutory immunity, pursuant to 33 U.S.C. §1321(b) (5), but he is still liable to pay a fine under the Refuse Act when the Government proceeds *in rem* against his vessel, 33 U.S.C. §§407, 412; and the vessel owner is automatically required to pay a "civil fine" of up to $5,000 under the FWPCA, 33 U.S.C. §1321(b) (6).

If oil is spilled from your vessel you must, in addition to paying the clean-up costs, immediately report the spill and pay a mandatory fine. The following examples are illustrative of the unfairness of the mandatory fine provisions of FWPCA.

1) A grossly negligent vessel collides with a properly moored oil barge, out of the channel, as a result of which oil escapes. The innocent barge owner immediately notifies the Coast Guard and cleans up the spill.

2) Vandals open the valve on a properly moored barge causing oil to escape. The barge owner notifies the Coast Guard and cleans up the spill.

3) While loading oil at a refinery, a defective connection to the barge's valve is noticed leaking causing a minor spill. The barge owner notifies the Coast Guard and cleans up the spill.

In each instance the barge owner *must* be fined because of the absolute liability feature of the Federal Water Pollution Control Act. The owner is not immune from this fine, under the lower court's holding, despite the fact that the only knowledge of the Coast Guard is that given by the vessel owner, which is a common occurrence, as in example 3,

where the vessel owner cleans up and the amount spilled was so small that the Coast Guard would not have known of it but for the report of the owner.

Another hypothetical situation, posed initially by the district court in *LeBeouf*, further illustrates the uniqueness and extreme harshness of the FWPCA. Assume that Congress chooses to deal with the national drug abuse problem by imposing dual penalties, criminal and civil, similar to those established in the FWPCA. Congress would first make certain activity criminal, for instance, the possession of a particular drug. It would then require that an offender turn himself in to authorities, providing for additional criminal penalties if the offender failed to notify the proper authorities. Upon proper notification the individual would be granted a limited form of immunity by statute, but he would immediately incur a civil fine, which would be mandatorily imposed on every such offender. Obviously such a statutory scheme would be – and is – constitutionally offensive. Yet the lower court held that the similar scheme contained in the FWPCA is constitutional.

In actual practice the Government is now attempting, in other cases, to recover *both* the Refuse Act penalty under the *in rem* provisions of 33 U.S.C. § 412 and the "civil" penalty of § 311(b) (6) of the FWPCA. The imposition of these penalties is based solely upon the information obtained from the compulsory reporting required to avoid the criminal sanctions of §311 (b) (5) of the FWPCA, and, as was recognized by the district courts in both *LeBeouf* and *CTCO-186-20*, the statutory incentive to report spills is being destroyed.

Petitioners submit that "fairness" has traditionally been the single most important test for whether a statute passes

Due Process muster. *Galvin v. Press*, 347 U.S. 522, 74 S.Ct. 737 (1954); *Howard v. United States*, 372 F. 2d 294 (9th Cir. 1967), cert. denied, 388 U.S. 915, 87 S.Ct. 2129 (1967). The Catch-22 of the FWPCA, under which a vessel owner is fined if it does not give required notice and fined when it does, is obviously unfair. The unfairness is great whether the Government proceeds for the "civil penalty" of the FWPCA or for an *in rem* penalty under the Refuse Act; it is greatest when the Government proceeds for both penalties.

Review by this Court of this unique legislation involving issues of national significance would appear to be required, since the lower court's interpretation makes the Act violative of the Due Process clause of the Fifth Amendment to the Constitution.

2. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *MENDOZA-MARTINEZ.*

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963), this Court set forth numerous factors to be considered in determining whether a statute provides penalties which are criminal or civil. In concluding that the penalty under review was criminal, not civil, the *Mendoza-Martinez* Court thought it particularly significant that the "civil" penalty was for conduct already prohibited by criminal statutes, for which criminal penalties were provided by law. The same is true here,for the Refuse Act has made the spillage of oil into navigable waters a criminal offense since 1899. The Water Pollution Control Act subjects owners and operators of vessels from which oil is spilled to additional penalties for conduct already made criminal by the Refuse Act, and, as indicated in *Mendoza-Martinez*, this is strong

evidence of the criminal nature of the penalty which is sought to be imposed by the FWPCA. See also *United States v. Constantine*, 296 U.S. 287, 56 S. Ct. 223 (1935); *Lipke v. Lederer*, 259 U.S. 557, 42 S. Ct. 549 (1922).

The foregoing is just one of the *Mendoza-Martinez* factors which strongly indicate that the penalties under review here are criminal and not civil sanctions. There are other factors which, on balance, convinced the *LeBeouf* District Court that the penalty is criminal. Nevertheless, the Fifth Circuit Court of Appeals refused to examine the nature of the penalties as mandated by *Mendoza-Martinez*. The Circuit Court held that the LeBeouf penalty under the FWPCA was a civil penalty only because the statute labeled it "civil", and it held that the penalty against the T/B CTCO-186-20 was civil because *in rem* forfeiture actions have long been viewed as concerning civil penalties. Appendix A at pp. A 8-9. (537 F. 2d at 152).

It is respectfully submitted that the nature of a penalty cannot be determined merely by examining the label which has been pasted to it. *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590 (1958). It is also submitted that the Refuse Act penalty is no less criminal because the Government has chosen to proceed in an *in rem* action against the vessel, when the owner of the vessel is admittedly immune from fines under the Refuse Act. *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972). The opinion of the Court of Appeals should be reviewed to determine whether the penalties sought to be imposed here are criminal or civil as tested by the criteria set forth in this Court's decision in *Mendoza-Martinez.*

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT HOLDING FORFEITURE AND CERTAIN CIVIL PROCEEDINGS TO BE "CRIMINAL IN NATURE" FOR FIFTH AMENDMENT PURPOSES.

The Fifth Circuit has held that corporations enjoy the same scope of immunity under the FWPCA as individuals, *United States v. Mobil Oil Corp., supra,* 464 F.2d 1124 (5th Cir. 1972). If so, the penalties sought to be imposed upon LeBeouf and T/B CTCO-186-20 are constitutionally prohibited by the Fifth Amendment. In *Boyd v. United States,* 116 U.S. 616, 6 S.Ct. 524 (1886), this Court held that a civil action for a forfeiture, though technically a civil proceeding, was in fact and in effect a criminal proceeding for Fifth Amendment purposes. Again in *Lees v. United States,* 150 U.S. 476, 14 S.Ct. 163 (1893), the Court held that the Fifth Amendment privilege against self-incrimination applies in an action to recover a civil penalty. The Court held that the penalty was a civil penalty and, as such, could be enforced in a civil action; yet it went on to hold that the prohibition against compulsory self-incrimination applied. This principle was reiterated recently in *United States v. United States Coin and Currency,* 401 U.S. 715, 91 S.Ct. 1041 (1971).

In other words, even though the FWPCA civil penalty and the Refuse Act *in rem* penalty might be found to be truly "civil" sanctions,compulsory self-reporting by individuals is prohibited or constitutes a complete defense by virtue of the Fifth Amendment. *See, Marchetti v. United States,* 390 U.S. 39, 88 S. Ct. 697, (1968); *Grosso v. United States,* 390 U.S. 62, 88 S. Ct. 709 (1968). Since individuals are immunized from these penalties which are "criminal in nature", all persons entitled to immunity under the FWPCA are likewise entitled to that immunization.

It is submitted that the decision of the Court of Appeals creates a direct conflict with the cases cited above, whether the penalties are truly civil or not, and the lower court's decision should be reviewed by this Court for resolution of that conflict.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted

CHARLES E. LUGENBUHL

CERTIFICATE OF SERVICE

I, Charles E. Lugenbuhl, one of the attorney's for petitioners in the above-entitled proceeding, being a member of the Supreme Court of the United States, do hereby certify that on the 6th day of January, 1977, I served copies of the Petition for Writ of Certiorari, together with the Appendix attached thereto, by mailing copies thereof in duly addressed envelopes by air mail postage pre-paid to Carla H. Hills, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D. C. 20530; to Gerald J. Gallinghouse, United States Attorney, United States Department of Justice, 500 Camp Street, New Orleans, Louisiana; to Anthony J. P. Farris, United States Attorney, 1200 Federal Building, Houston, Texas 77002; to Leonard

Schaitman and Michael H. Stein, Attorneys, Appellate Section, Civil Division, Department of Justice, Washington, D.C. 20530; to Austin W. Lewis, Liskow & Lewis, 22nd Floor, 225 Baronne Street, New Orleans, Louisiana 70112; to Clyde R. Brown, Shotwell, Brown & Sperry, 708 Ouachita National Bank Building, Monroe, Louisiana 71201; to Lawrence E. Donohoe, Jr., Davidson, Meaux, Onebane & Donohoe, 201 West Main Street, Lafayette, Louisiana 70501; to Robert Roberts III, Blanchard, Walker, O'Quin & Roberts, First National Bank Building, Shreveport, Louisiana 71101; to Thomas A. Brown, Brown & Teed, 2303 Caroline, Houston, Texas 77004; to Lawrence K. Benson and John C. Christian, Milling, Benson, Woodward, Hillyer & Pierson, 1100 Whitney Building, New Orleans, Louisiana 70130; to Richard B. Sadler, Jr., Provosty & Sadler, 8th Floor, Guaranty Bank Building, Alexandria, Louisiana 71301; to George J. Bailey, Bailey & Hollier, 812 East St. Mary Boulevard, Lafayette, Louisiana 70501; to John T. Guyton, Hargrove, Guyton, Ramey & Barlow, 11th Floor, Mid South Towers, Shreveport, Louisiana 71101, Marshall Ballard III, 1010 Common Street, New Orleans, Louisiana 70112; to Edwin K. Legnon, 3308 Tulane Avenue, New Orleans, Louisiana 70119.

Charles E. Lugenbuhl

APPENDIX A

UNITED STATES v. LE BEOUF BROS.TOWING CO., INC.
Cite as 537 F.2d 149 (1976)

UNITED STATES of America,
Plaintiff-Appellant,
v.
LE BEOUF BROS. TOWING CO., INC.,
Defendant-Appellee

UNITED STATES of America,
Plaintiff-Appellant,
v.
T/B CTCO 186-20, her tackle, apparel, furniture, etc. and
T/B CTCO 185, etc.,
Defendants-Appellees.

Nos. 74-2849, 74-3140

United States Court of Appeals, Fifth Circuit

Aug. 16, 1976

Rehearing and Rehearing En Banc Denied Oct. 12, 1976

Two oil spill cases were consolidated on appeal. In one, in which the Government sought to recover a "civil" penalty under the Water Quality Improvement Act, the United States District Court for the Eastern District of Louisiana, at New Orleans, Jack M. Gordon, J., 377 F. Supp. 558, granted summary judgment against the Government, and in the other, which was an in rem action against barges under the Refuse Act, the United States District Court for the Southern District of Texas, at Houston, Woodrow B. Seals, J., dismissed, and the United States appealed in each case. The Court of Appeals, Gee, Circuit Judge, held that insofar as corporations were involved, reporting oil spill did not confer immunity

with respect to "civil" penalty under the Water Quality Improvement Act, and forfeiture action brought in rem under the Refuse Act was also a civil proceeding and did not trigger the immunity provision.

Reversed and remanded.

1. Penalties - 16

Inquiries as to "civil" or "criminal" nature of monetary penalties are necessary only when some constitutional protection is implicated by imposition of a penalty or statutory language is ambiguous.

2. Witnesses - 306

Fifth Amendment privilege against self-incrimination does not extend to corporations. U.S.C.A. Const. Amend. 5.

3. Constitutional Law - 299

By fashioning a constitutionally-required immunity provision to protect individuals reporting oil spills, Congress did not thereby deprive corporate entities, which never had protection against self-incrimination, of due process insofar as immunity may not have same scope as to them.

4. Witnesses - 297(3)

Fifth Amendment privilege against self-incrimination is personal in nature and cannot be claimed on behalf of a third party. U.S.C.A. Const. Amend. 5.

5. Navigable Waters - 35

A liberal construction of the immunity provision of statute with respect to reporting oil spills, insofar as it applies to individuals, would not require same liberal construction as

it applies to corporations, where broad construction as to individuals would turn on presumption that Congress does not intend to act unconstitutionally, since that presumption need not be indulged where none of the available interpretations would infringe on constitutional protections afforded corporations. Water Quality Improvement Act of 1970, §11(b) (4), 33 U.S.C.A. § 1161(b)(4); Federal Water Pollution Control Act Amendments of 1972, §311(b)(5), 33 U.S.C.A. 1321(b)(5); U.S.C.A. Const. Amend. 5.

6. Navigable Waters - 35

Corporation, having reported oil spill, was not immune from imposition of "civil" penalty in connection with the spill, regardless of the alleged criminal "nature" of such penalty. Water Quality Improvement Act of 1970, §11(b)(4, 5), 33 U.S.C.A. §1161(b) (4,5).

7. Navigable Waters - 35

Forfeiture actions brought in rem under the Refuse Act are civil proceedings, and thus, at least with respect to corporations, do not trigger the immunity provisions of statute with respect to reporting oil spills. Federal Water Pollution Control Act, § 1(a), 33 U.S.C.A. §1151(a); Federal Water Pollution Control Act Amendments of 1972, §§ 101(a), 311(b)(5,6), (f,k,l), 33 U.S.C.A. §§1251(a), 1321(b)(5,6), (f,k,l); Rivers and Harbors Appropriation Act of 1899, §§13 et seq., 16,33 U.S.C.A.§§407 et seq., 411, 412.

8. Constitutional Law - 70.1(1)

Congressional schemes need not seem to courts to be symmetrical, consistent or even effective to be valid.

Anthony J.P. Farris, U.S. Atty., Houston, Tex., Gerald J. Gallinghouse, U.S. Atty., Leonard P. Avery, Asst. U.S. Atty.,

New Orleans, La., Helen M. Eversberg, Jack Shepard, Asst. U.S. Attys., Houston, Tex., Allen Van Emmerik, Admiralty & Shipping Section, Leonard Schaitman, Michael H. Stein, Dept. of Justice, Washington, D.C., for plaintiff-appellant.

Charles E. Lugenbuhl, Donald R. Abaunza, Thomas J. Grace, New Orleans, La., Thomas A. Brown, G. Byron Sims, Houston, Tex., for defendants-appellees.

Lawrence K. Benson,John C. Christian, New Orleans, La., Benson, et al., amicus curiae.

John L. Hantel, New Orleans, La., for Tidewater Marine Service, amicus curiae.

Appeals from the United States District Courts for the Eastern District of Louisiana and the Southern District of Texas.

Before TUTTLE and GEE, Circuit Judges.*

GEE, Circuit Judge.

These two cases, which were consolidated on appeal, require us to determine the scope of the statutory immunity entailed when a corporation's agent reports an oil spill to the Coast Guard in the manner required by section 11(b)(4) of the Water Quality Improvement Act of 1970 (WQIA), 33 U.S.C. §1161(b)(4)(1970), and section 311(b)(5) of its successor statute, the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C.§1321(b)(5) (Supp. 1974).[1] The lower courts in both cases ruled that the statutes

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* The case has been decided by a quorum of the court. *See* 28 U.S.C.§46.

1. The 1972 amendments took effect several months after the *LeBeouf* spill but before the *T/B CTCO* spill.

confer immunity from any statutorily-imposed penalties that are "criminal in nature." We disagree and reverse in both cases.

Both the 1970 and 1972 statutes[2] require "any person in charge" of a vessel or an onshore or offshore facility to notify the Coast Guard[3] of any oil discharge into the water in quantities determined harmful by the President,[4] provide a criminal penalty for failure to make the required notification, and prohibit use of information reported or derived from that report against the reporting person "in any criminal case." Both cases here concern oil spills that the lower courts found were properly reported by agents of the appellees under the mandatory disclosure provisions. In *Le Beouf*,[5] the

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2. The 1970 statute reads in pertinent part:

> Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil from such vessel or facility in violation of paragraph (2) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

33 U.S.C. § 1161(b)(4)(1970). The wording of the 1972 statute is identical, with two substantive changes not relevant here. *See* note 4 *infra*.

3. The statute requires making a report to "the appropriate [federal] agency," which by executive order, Exec. Order No. 11,548, 3 C.F.R. §539(1972), is the Coast Guard. *See* also 33 C.F.R. §153.100 (1972); 40 C.F.R.§110.9 (1972).

4. The 1972 amendments authorize the President to select other hazardous substances whose discharge should be prohibited and thus subject to mandatory disclosure. 33 U.S.C.§1321(b)(5) (Supp. 1974).

5. The opinion is reported at 377 F.Supp. 558 (E.D.La. 1974).

lower court granted summary judgment against the government's suit to recover a $2,500 penalty assessed by the Coast Guard under section 11(b)(5) of the WQIA, 33 U.S.C. § 1161 (b)(5) (1970), which imposes strict liability for a penalty, denominated "civil," of up to $10,000 on the owner or operator of any vessel or facility from which oil is knowingly discharged in harmful quantities.[6] In *T/B CTCO*, the lower court dismissed the government's *in rem* action against appellee CTCO's barges for violation of the Rivers and Harbors Appropriations Act of 1899 (Refuse Act), 33 U.S.C. §§ 407 et seq. (1970), which prohibits the discharge of refuse into navigable waters, id. § 407, makes any violation of the Act by a person or corporation a misdemeanor punishable by a fine or imprisonment, id. § 411, and authorizes an *in rem* action for the amount of the fine against any vessel used in the violation, id. § 412. Ruling that the statutory immunity provisions - section 11(b)(4) in *Le Beouf*, and its virtually identical successor, section 311(b)(5) in *T/B CTCO* - should be interpreted to bar imposition of any monetary sanction that is what they deemed "criminal in nature," both courts reasoned that allowing use of evidence derived from a party's compliance with the compulsory reporting requirement would implicate the fifth amendment privilege against self-incrimination and frustrate the purpose of the immunity provision by discouraging disclosure of spills.

[1-7] Both courts unnecessarily concerned themselves with the nature of the monetary penalties imposed. Such inquiries are necessary only when some constitutional protec-

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6. The statute reads in pertinent part:

Any owner or operator of any vessel, onshore facility, or offshore facility from which oil is knowingly discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $10,000 for each offense.

33 U.S.C. § 1161(b)(5) (1970). The 1972 amendments reduce the maximum fine to $5,000 and eliminate the scienter requirement. 33 U.S.C. § 1321(b)(6) (Supp. 1974).

tion is implicated by the imposition of a penalty[7] or the statutory language is ambiguous. In this case, no constitutional right is involved. The fifth amendment privilege against self-incrimination does not extend to corporations.[8] *California Bankers Association v. Shultz*, 416 U.S. 21, 55, 94 S.Ct. 1494, 39 L.Ed. 2d 812 (1974); *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 88 S.Ct. 1978, 20 L.Ed. 2d 1094 (1968). If appellees were individuals, then we would of necessity examine the nature of the so-called "civil penalties"[9] to determine if the immunity provision as it applied

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7. Every case cited by the lower courts or by appellees in which the Supreme Court analyzed the civil-criminal nature of a penalty concerns some constitutional right afforded defendants in criminal cases. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L. Ed. 2d 644 (1963) (fifth and sixth amendments); *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed. 2d 630 (1958) (fifth and eighth amendments); *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938) (fifth amendment); cf. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 Cornell L. Rev. 478, 491 (1974). Compare *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975), *cert. granted on other grounds*, 424 U.S. 964, 96 S.Ct. 1458, 47 L.Ed. 2d 731 (1976) (sixth amendment).

8. Appellees concede lack of a self-incrimination violation. While they raise in passing one constitutional objection based on a due-process, fundamental-fairness notion, we reject the suggestion that by fashioning a constitutionally-required immunity provision to protect individuals, Congress thereby "unfairly deprived" corporate entities of a protection they never had.

9. It is necessary to examine the nature of the penalties only when the owner or operator is an individual who is also a "person in charge" required to report the discharge under 33 U.S.C. § 1321(b)(5) (Supp. 1974). Obviously, no such need arises under the *in rem* provision of the Refuse Act, since the penalty does not apply *in personam*. Nor does any *constitutional* problem arise if an employee reports a spill that forms the basis of a criminal prosecution against the individual or corporate owner or operator, since the fifth amendment privilege is personal in nature and cannot be claimed on behalf of a third party, *see California Bankers Ass'n. v. Shultz*, 416 U.S. 21, 55, 94 S.Ct. 1494, 39 L.Ed. 2d 812 (1974); *United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 2167-68, 45 L.Ed. 2d 141 (1975), although this circuit has held that the *statutory* immunity would nonetheless apply in a criminal prosecution. *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972) (corporate owner).

to them required a broad interpretation in order to pass constitutional muster, *cf. Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972),[10] or even to decide if the penalties are unconstitutional as applied. But since these corporate defendants cannot claim a pertinent constitutional protection, the issue is purely one of statutory construction, and appellees are foreclosed by the clear statutory wording.[11] The immunity provision, by its terms, extends only to "criminal" cases, while Congress in the very next paragraph expressly labeled the sanction in 33 U.S.C. §1161(b)(5) about which *Le Beouf* complains a "civil penalty." Only the most compelling demonstration of a contrary legislative intent would persuade us to ignore the plain words of the statute. The wording is unequivocal; by it Congress cannot have intended to extend immunity to civil cases, regardless of their "nature."[12] Likewise, forfeiture actions

10. But cf. California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L. Ed. 2d 9 (1971), and *United States v. Sullivan*, 274 U.S. 259, 47 S. Ct. 607, 71 L.Ed. 1037 (1927), both of which uphold notification requirements in essentially regulatory schemes. One could argue that adoption of a broad interpretation of the grant of immunity to individuals would require a similarly liberal construction of the provision as it applies to corporations since nothing in the statute or legislative history justifies a distinction between the two. *See* Note, 51 Texas L. Rev. 155, 161 (1972). But if we construed the statute more broadly than its plain language, despite the absence of legislative history to support such a construction, it would only be because we presume that Congress does not intend to act unconstitutionally; that presumption need not be indulged when none of the available interpretations infringes on constitutional protections.

11. As well as the normal rule that statutory grants of immunity should be interpreted strictly. See, *e.g., Helke v. United States*, 227 U. S. 131, 33 S.Ct. 226, 57 L.Ed. 450 (1913).

12. *Accord, Apex Oil Co. v. United States*, 530 F.2d 1291, 1293 n. 7 (8th Cir. 1976) (criticizing the lower court decision in *Le Beouf*); *United States v. General Motors Corp.*, 403 F. Supp. 1151, 1160-61 (D. Conn. 1975).

brought *in rem* under the Refuse Act are civil proceedings,[13] *see United States v. T/B NMS*, 330 F. Supp. 781, 782 (S.D. Tex. 1971) (Bue, J.); *Shipman v. United States*, 309 F.Supp. 441, 442(E.D. Va. 1970) (citing cases), and thus do not trigger the immunity provision.

[8] Appellees suggest that the interpretation which we adopt thwarts the statutory purpose of assuring prompt notification of oil spills. But congressional schemes need not seem to courts symmetrical, consistent, or even effective to be valid. Furthermore, appellees and the lower courts misconceive the multipurpose nature of the statutory scheme. Congress intended both to prevent harmful spills and to minimize the damage caused by such spills.[14] The notice/immunity section serves the subsidiary purpose of encouraging prompt notification of spills without infringing the protection against self-incrimination. At the same time, the section imposing civil penalties seeks, at least in part, to trans-

13. *In rem* forfeiture actions have long been viewed as concerning civil penalties. See, *e.g., The Palmyra*, 25 U.S. (12 Wheat) 1, 12-13, 6 L.Ed. 531 (1817). See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-84, 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974) (quoting *The Palmyra*). Since corporations cannot claim a self-incrimination privilege, we need not determine the scope of *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), which held that certain kinds of forfeiture proceedings "are in their nature criminal," id. at 634, 6 S.Ct. 524 and thus subject to self-incrimination limitations.

14. See Case Comment, *Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases*, 55 B.U.L Rev. 112, 123 (1975). Congress declared in the first provision of the WQIA that "[t]he purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution," 33 U.S.C. §1151(a) (1970), and in the FWPCA it declared that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C§ 1251(a) (Supp. 1974).

fer clean-up costs to those most culpable.[15] Appellees argue that enforcing civil penalties against those who give notice of spills discourages reporting of smaller, less-noticeable spills that might otherwise go undiscovered. But they forget that the penalty assessment provision furthers the statute's deterrent function and at the same time gives the Coast Guard discretion to reduce the penalty where warranted.[16] The criminal penalties for failure to report a spill should sufficiently encourage corporate employees to report spills even if their corporate employers thereby incur fines.[17] Thus,

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15. In 33 U.S.C. § 1161(k), (l) (1970) (now codified at 33 U.S.C. 1321 (k),(l)(Supp. 1974)), Congress established a "revolving fund" into which all fines received under the Act are to be deposited to defray the cost of oil removals. Appellees correctly note that the government can recover cleanup costs under 33 U.S.C. § 1161(f) (1970) (now cofified at 33 U.S.C. §1321(f) (Supp. 1974)), but nothing is recovered when the guilty party's identity cannot be determined, so section 11(b)(4)'s automatic penalty imposed on known offenders over and above costs helps defray expenses incurred in removing other discharges caused by unknown sources. *See Hearings on H.R. 15405Before a Subcomm. of the S. Comm. on Appropriations* (D.O.T. & Related Agencies Appropriations), 93d Cong., 2d Sess. 281, 343-44 (1974) (the self-sustaining nature of the "revolving fund" is being threatened by, *inter alia* to recover costs from unidentified polluters and by the district court decision in *Le Beouf).*

16. Under 33 U.S.C. § 1611(b)(5)(1970) (now codified at 33 U.S.C. §1321(b)(6) (Supp. 1974)).

> Any such civil penalty may be compromised by such Secretary. In determining the amount of penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the *gravity of the violation, shall be considered by such Secretary.*

(emphasis added). As a matter of policy, the Coast Guard considers the amount of oil discharged in determining the amount of the penalty. *United States v. Le Beouf Bros. Towing Co., Inc.* 377 F. Supp. 558, 569 (E.D.La. 1974) (appendix) (Coast Guard Policy for the Application of Civil Penalties under Section 311(b)(6), F.W.P.C.A.).

17. Appellees point to *United States v. Mobil Oil Corp.,* 464 F.2d 1124 (5th Cir. 1972), as discerning an overriding congressional concern to encourage disclosure. But in *Mobil Oil,* which held that a corporate owner could be a "person in charge" entitled to claim section 11(b)

(Footnote 17 - continued on next page)

the statute has internal consistency, even though its provisions occasionally – and necessarily, in view of the Act's multiple objectives -- work at cross purposes. As for T/B CTCO, while the policies underlying the forfeiture provision of the Refuse Act are less clear – since the funds derived from it are not ear-marked to cover cleanup expenses – the multipurpose statutory framework of the FWPCA described above suggests that Congress thought removing the threat of criminal prosecution a sufficient inducement for the "person in charge" to report spills. We conclude that it did not intend to extend that immunity to *in rem* forfeiture proceedings.

REVERSED and REMANDED for proceedings not inconsistent with this opinion.

(Footnote 17 - continued from previous page).

(4)'s statutory immunity from criminal prosecution under the Refuse Act, the court recognized the pressure on a corporate owner faced with possible criminal liability if discovered polluting not to report a spill (in spite of criminal sanctions for nondisclosure), but it was not required to consider the milder chilling effect of imposing a civil fine on an owner confronting possible criminal liability for failure to give notice.

APPENDIX B

JUDGMENT OF U.S. COURT OF APPEALS - FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3140

D. C. Docket No. CA 73-915 "I"

UNITED STATES OF AMERICA,
Plaintiff-Appellant

versus

LE BEOUF BROS. TOWING CO., INC.,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

Before TUTTLE and GEE, Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

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*This case has been decided by a quorum of the court. See 28 U.S.C. § 46.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court for proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 16, 1976

Issued as Mandate: October 20, 1976

APPENDIX C

JUDGMENT OF U.S. COURT OF APPEALS - FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2849

D. C. Docket No. CA 72-H-1443

UNITED STATES OF AMERICA,
Plaintiff-Appellant

versus

T/B CTCO 186-20, her tackle, apparel, furniture, etc. and T/B CTCO 185, ETC.,
Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas

Before TUTTLE, and GEE, Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

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* This case has been decided by a quorum of the Court. See 28 U.S.C. § 46.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded for proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

August 16, 1976

Issued as Mandate: October 20, 1976.

APPENDIX D

Letter from Clerk, U.S. Court of Appeals

United States Court of Appeals
Fifth Circuit
Office of the Clerk

October 12, 1976

TO ALL COUNSEL OF RECORD

NOS. 74-2849 - USA v. T/B CTCO 186-20, etc.
74-3140 - USA v. Le Beouf Bros. Towing Co., Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: S/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. Leonard Schaitman
Messrs. Charles E. Lugenbuhl
Thomas J. Grace
Donald R. Abaunza
Messrs. Lawrence K. Benson
John C. Christian
Mr. John L. Hantel

APPENDIX E

OPINION OF DISTRICT COURT

UNITED STATES of America
vs.
LeBEOUF BROS. TOWING CO., INC.

Civ. A. No. 73-915

United States District Court, E.D. Louisiana
June 14, 1974.

Government brought action to recover penalty which had been imposed by Coast Guard against towing company, one of whose vessels had spilled gasoline into the ocean. The District Court, Jack M. Gordon, J., held that penalty which was sought to be imposed against towing company was criminal in nature, despite fact that statute denominated it a civil penalty, so that statutory provision that reports of oil spills which were required to be made upon pain of criminal liability could not be used against one making the report in any criminal proceeding applied to the instant proceeding and precluded imposition of the penalty.

Summary judgment for defendant.

1. Action - 18

Test for determining whether a particular provision of legislation is civil or criminal in character is whether the legislative aim in providing the sanction was to punish the party for engaging in the activity involved or to regulate the activity in question.

2. Navigable Waters - 35

Penalty imposed on towing company which had reported its oil spill to Coast Guard was a criminal penalty, despite fact that statute denominated it a civil penalty, so that statutory immunity from use of required report in any criminal action applied to coast guard assessment of the penalty against the towing company. Federal Water Pollution Control Act, § 11(b)(4,5) as amended 33 U.S.C.A. § 1161(b)(4,5).

3. Criminal Law - 393(1)

Congress may not, under guise of referring to sanction as a civil penalty, impose penalty against a person on the basis of a report of his activities which he is required to make upon pain of criminal liability.

4. Navigable Waters - 35

Statutory provision for imposition of penalty upon one who discharges oil upon navigable waters may be enforced only if it is supported by information derived independently from report filed pursuant to statutory requirement that person making such discharge report the discharge. Federal Water Pollution Control Act, § 11(b)(4,5) as amended 33 U.S.C.A. §1161(b)(4,5).

Allen van Emmerik, Admiralty & Shipping Section, Dept. of Justice, Washington, D.C., and Leonard P. Avery, Asst. U. S. Atty., New Orleans, La., for plaintiff.

Charles E. Lugenbuhl, Donald R. Abaunza, Thomas J. Grace, Lemle, Kelleher, Kohlmeyer & Matthews, New Orleans, La., for defendant.

Lawrence K. Benson, and John C. Christian, Milling, Benson, Woodward, Hillyer & Pierson, Austin W. Lewis, Liskow & Lewis, New Orleans, La., Richard B. Sadler, Jr., Provosty & Sadler, Alexandria, La., Clyde R. Brown, Shotwell, Brown & Sperry, Monroe, La., George J. Bailey, Bailey & Hollier,

Lawrence E. Donohoe, Jr., Davidson, Meaux, Onebane & Donohoe, Lafayette, La., John T. Guyton, Hargrove, Guyton, Ramey & Barlow, Robert Roberts, III, Blanchard Walker, O'Quin & Roberts, Shreveport,La., amici curiae.

Donald R. Abaunza, Lemle, Kelleher, Kohlmeyer & Matthews, New Orleans, La., amicus curiae for Chotin Transportation, Inc.

Marshall Ballard, III, Burke & Ballard, New Orleans, La., amicus curiae for Penrod Drilling Co., Primal Boat Co. and Petrol Marine Co.

James G. Burke, Jr., Burke & Ballard, New Orleans, La., amicus curiae for Offshore Marine Service Assn.

Edwin K. Legnon, New Orleans, La., amicus curiae for Tidewater Marine Service, Inc. on behalf of its subsidiary, affiliated and related companies,

JACK M. GORDON, District Judge:

This case presents a question of first impression requiring the Court to decide the validity of the application of a section of the Federal Water Pollution Control Act prohibiting intentional discharge of oil into the navigable waters of the United States. The Court has concluded that the monetary sanction authorized pursuant to this statutory section at issue is invalid because, not withstanding its nomenclature, it is unmistakably a criminal penalty, and, as such, its imposition, from this set of facts, is barred by statutory immunity induced through compulsory self-reporting of oil discharges.

The Federal Water Pollution Control Act, Title 33, United States Code, Section 1151 et seq. (hereinafter referred to as the "WPCA" or "Act"), as amended by the Water and En-

vironmental Quality Improvement Act of 1970,[1] similar to the subject matter it affects, is complex and detailed. A general survey of the entire section at issue, § 1161 of the Act, however, provides a useful analytic backdrop against which one may probe and evaluate. A panoply of legislative guidelines, in addition to the "civil" penalty paragraph sub judice, is contained in § 1161. The section promulgates, inter alia, rules governing notification of oil spillage,[2] removal of discharged oil and allocation of the cost incurred therein,[3] ex-

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1. This legislation more commonly may be labelled Section 11 of the Water and Environmental Quality Improvement Act of 1970 (WQIA), amending the Federal Water Pollution Control Act. Subsections and (sub)-subsections of § 1161 of the United States Code, Title 33, substantially parallel those of Section 11. The Act was amended again in 1972, which resulted in the deletion of the element "knowingly" as a condition precedent to the invocation of the "civil" penalty when there is a discharge of oil and in the modification of the maximum amount of the "civil" penalty in Paragraph 5 of § 1161(b) from $10,000 to $5,000.

2. 33 U.S.C. Section 1161(b)(4).

3. *Id.*, Subsections (c), (f) and (j).
Subsection (c)(1) reads in pertinent part:

> Whenever any oil is discharged, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, the President is authorized to act to remove or arrange for the removal of such oil at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

Another remedial aspect, Subsection (f) protects the government and the public from shouldering the economic burden of oil clean-up and regulates removal cost. It states:

> (f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil is discharged in violation of subsection (b)(2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the

ceptions to and limits of liability for the charged party,[4] the administrative-enforcement phase of the WPCA,[5] as well as

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(Footnote 3 continued from previous page).

United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b)(2) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed $8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Secretary is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil in violation of subsection (b)(2) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B)

(Footnote 3 - Continued on page A-23
(NOTE: See page A-23 for footnote 4 and 5

criminal and civil penalties.[6] Early recognition of the sundry concepts, crystallized through regulations of this section, paves the way for an improved understanding of the factual and resultant legal issues involved in this litigation.

(Footnote 3 - Continued from page A-22)

an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b)(2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed $8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

4. *Id.*

5. The President of the United States is authorized to delegate the administration of this section to the appropriate federal agencies. 33 U.S.C. §1161(l). By delegation from the President and the Secretary of Transportation, the Commandant of the United States Coast Guard administers and enforces the WPCA. *See*, 49 C.F.R. §1.46(1) and 33 C.F.R. §153.03.

Appropriations to finance these statutory functions are derived in part from this Subsection (k) outlay and in part from the collection of *any* funds received during the operation of the Act. (Emphasis supplied). Subsection (k) reads:

There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed $35,000,000 to carry out the provisions of subsections (c), (i), and (l) of this section and section 1162 of this title. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

(Footnote 5 - continued on next page)
(NOTE: Footnote 6 on page A-24)

The basic facts are not in dispute. The United States Coast Guard notified the defendant, LeBeouf Bros. Towing Co., Inc. (hereinafter referred to as "LeBeouf") that the govern-

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(Footnote 5 - continued from previous page)

For example, the penalty included in Subsection (j) helps to allay some of the expenses inherent in the daily supervision required by the WPCA. Subsection (j) reads in toto:

> (1) Consistent with the national contingency plan required by subsection (c)(2) of this section, as soon as practicable after April 3, 1970, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws, (A) establishing methods and procedures for removal of discharged oil, (B) establishing criteria for the development and implementation of local and regional oil removal contingency plans, (C) establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities, and (D) governing the inspection of vessels carrying cargoes of oil and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from such vessels in violation of this section.
>
> (2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulation, shall be liable to a civil penalty of not more than $5,000 for each such violation. Each violation shall be a separate offense. The President may assess in compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

In this context, Subsection (c)(2) of § 1161 delineates a national plan under which a coordinated system could be achieved to detect, detain, and remove oil from navigable waters with a maximum degree of efficiency.

6. *See,* § 1161(b)(4) quoted in text, *infra;* §1161(b)(5) quoted in text, *infra;* and §1161(j) previously cited in footnote 5.

ment had proposed a penalty of $3,000 under §1161(b)(5) of the WPCA against LeBeouf due to a gasoline spill by one of its vessels occurring on or about June 3, 1972. Shortly thereafter, a Coast Guard hearing was convened and the penalty assessed against the defendant for the June 3,1972, spill was compromised to $2,500. Since the defendant denied the propriety of any penalty owed to the government, the matter was referred by the Coast Guard to the United States Attorney, who filed this lawsuit in order to collect the $2,500 penalty.

Sub-part (b)(4) of § 1161 of the Act sets forth the mandatory notification procedures activated by an unlawful discharge of oil into or upon the navigable waters of the United States; failure to notify the proper authorities results in the imposition of penal sanctions, although a complying party enjoys attendant immunity from criminal prosecution. This sub-section reads:

> (4) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil from such vessel or facility in violation of paragraph (2) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

The following paragraph, albeit self-described as a "civil" penalty, is the gravamen of the current litigation. Title 33, United States Code, Section 1161(b)(5) requires that:

(5) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil is knowingly discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $10,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46, of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

Defendant LeBeouf ostensibly complied with the notification proviso upon discovery of the gasoline spill and now argues that said self-disclosure provided the Coast Guard with sufficient data by which the latter could substantiate the so-called civil penalty of paragraph 5 subsequently assessed against defendant. Defendant maintains that this type of connexity between the two above quoted paragraphs makes both criminal in nature and invalidates paragraph 5 as being unconstitutional, and, accordingly, defendant has incorporated this logic into a motion to dismiss and/or for summary judgment. The gist of LeBeouf's position is relatively facile: paragraph 5 of the Act, although containing the appellation "civil penalty", prescribes a criminal penalty and ergo is a penal, not remedial provision. Defendant avers

that the immunity granted in paragraph 4 perforce must extend to cover the succeeding paragraph, since, to do otherwise, defendant contends, would abrogate the constitutional protections afforded by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and unduly would circumscribe the statutory immunity of paragraph 4.

The Court concurs with the legal postulate espoused by defendant that the penalty inflicted by section 1161, subsection b, paragraph 5 of the WPCA is infirm unless it comports with the use and derivative use immunity granted in paragraph 4.

It is readily discernible from a reading of paragraph 4 that its cardinal purpose is to induce the culpable party to notify the Coast Guard about any oil spillage. A party who does not issue the requisite notice, regardless of whether such omission was intentional or unintentional, subjects itself to multiple criminal penalties, and, the litigants before the Court do not contest the fact that this penalty, without pretense, is an unadulterated penal sanction. Of course, a party who heeds the self-disclosure mandate of paragraph 4 insulates itself from prosecution conterminous with the concomitant grant of immunity. The nub of disagreement focuses on the categorization of paragraph 5, that is, if the penalty authorized by paragraph 5 is civil in nature, as contended by the government, or is a criminal sanction, as averred by defendant and amici curiae. Moreover, the effect of a determination that paragraph 5 of section 1161 is criminal in nature would subject this penalty to legislative immunity limitations enumerated in paragraph 4.

[1] Judicial determination as to the regulatory or penal character of a statute is invariably a difficult task. A concise test frequently articulated by the courts in determining whether a particular provision of legislation is civil or crimin-

al in character is whether the legislative aim in providing the sanction was to punish the party for engaging in the activity involved or to regulate the activity in question. *See*, Telephone News-System, Inc. v Illinois Bell Telephone Company, 220 F.Supp. 621 (N.D. Ill. 1963), aff'd, 376 U.S. 782, 84 S.Ct. 1134, 12 L.Ed. 2d 83 (1964); United States v. Futura, Inc., 339 F.Supp. 162 (N.D. Fla. 1972). The problem of interpretation in the instant situation is compounded by the absence of any clear and persuasive legislative history showing whether the particular santion in question was intended to punish, although part of an overall regulatory scheme. Where legislative history offers ambiguous guidelines to statutory construction, then certain other factors must be considered determinative. The Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S.Ct. 554, 567 9 L.Ed.2d 644 (1963) set forth some of the more particularly relevant criteria employed in this evaluation:

> Whether the [questioned] sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

The composite of answers to these factorial inquiries indicate beyond peradventure that paragraph 5 only can be interpreted as punitive.

At first blush, the paragraph here in question appears to be nonpenal, especially in view of the purported "civil

penalty" that is assessed for the proscribed activity.[7] But to be guided in the interpretative process by such superficial implements as word classification or legal jargon truly would be an analytical pitfall in allowing form to replace substance. Chief Justice Warren, speaking for the Court in Trop v. Dulles, 356 U.S. 86, 94, 78 S.Ct. 590, 594, 2 L.Ed. 2d 630 (1958) recognized the patent inadequacy of such an approach when he remarked: "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of labels pasted on them!" The real nature and intended objective of a statute must be unearthed to avoid Swiftonian-like deceit. *Cf.* Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); Boyd v. United States, 116 U.S. 616, 634, 6 S.Ct. 524, 534 29 L.Ed. 746 (1886).

Use of a hypothetical situation graphically demonstrates the inherent weakness in name dependency in the field of law. Imagine,for example, if Congress, as part of a broad regulatory scheme designed to remedy the current national drug abuse problem, chose to impose dual penalties, similar to these in the instant situation, upon certain proscribed activity such as possession of a small quantity of a controlled narcotic substance; first, failure to report the possession to law enforcement authorities subjects the offender to incarceration and a fine, and, second, a mandatory "civil penalty" in the form of a substantial fine is imposed because of the possession. Assuming, for the moment, that the hypothetical violator turns himself in to the authorities, immunizing himself from the initial set of "criminal" punishment revolving around disclosure,[8] then, under the second section,

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7. Moreover, it is well settled that for one act a person might be liable to pay both a criminal and a civil sanction. United States v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943). See footnote 14, *infra*, and accompanying text.

8. Even if statutory immunity was not available, the offender apparently still would be free from prosecution in light of such jurisprudence as Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968) and Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709, 19 L.Ed.2d 906 (1968) and their progeny.

that person still could be penalized by the government under the guise of a "civil" assessment. This result presents a classical Catch-22 situation in complete denigration of the statutory purpose in fostering self-disclosure, inasmuch as one would face punitive sanctions without regard to whether there is compliance with notification procedures.

As the Court will detail at a later juncture in its opinion[9] the only means of avoiding this offensive and undesirable result in the instant case is through proper application of the immunity provision in paragraph 4, whose protective scope necessarily must embrace the paragraph 5 penalty. In fact, though not intending to suggest or condone the approach, this Court appreciates the fact that the government's position concerning the present statutory scheme encourages an offender not to report spillage when circumstances indicate that such spillage forever might be undetected since the odds markedly would favor avoidance of any penalty; on the other hand, the exemplary offender who notifies the Coast Guard of a spill has no odds to play – a monetary penalty is the inevitable and certain fate. Such discouragement of reporting oil spillage is inconsistent with the overall regulatory purpose of the Act, which requires the detection of the maximum possible number of spills, and, therefore, is not compatible with the government's proffered description of the paragraph 5 penalty as remedial rather than punitive.

Delving behind the pejoration, "civil penalty" contained in paragraph 5 of the Act, the Court additionally observes that the monetary penalty, here, exposure to a $10,000 fine, traditionally has been regarded as a measure of criminal punishment. United States v. Krapf, 180 F. Supp. 886 (D.N.J. 1960), aff'd, 285 F.2d 647 (3rd Cir. 1961); United States v. Futura, Inc., *supra*. Besides the judicial philosophy

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9. See footnote 13, *infra*, and accompanying text.

regarding a fine, its mandatory imposition,[10] a fact admitted by the Coast Guard, the agency which administers the WPCA, further convinces the Court that the paragraph 5 penalty simply constitutes a complementary means by which to criminally punish the wrongdoer rather than effectuating and regulating purposeful public policy sought to be achieved by the Act.[11] Simply stated, the Court cannot find any legiti-

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10. It is Coast Guard policy to affix a penalty under paragraph 5 at or near the maximum amount unless extenuating circumstances, statutorily enumerated, justify mitigation. Identified as Appendix A, United States Coast Guard Commandant Instruction 5922.11A and explanatory enclosure promulgates this administrative attitude with respect to 33 U.S.C. § 1321(b) (6), the 1972 revised counterpart of 33 U.S.C. §1161(b)(5). See footnote 1 *supra*.

11. This juridical determination is supported by the touchstones employed in meting out a paragraph 5 penalty, namely, wealth of the offender and gravity of the violation. These same factors characteristically and invariably are used by courts as guideposts when sentencing criminal defendants. Compare the text accompanying footnote, 14, *infra*.

In this same vein, defendant also assails the criteria upon which the paragraph 5 penalty is bottomed and suggests to the Court that such a standard is unconstitutional as violative of the Fifth and Fourteenth Amendments to the United States Constitution. Defendant particularly objects to the statutory language requiring that assessment of the mandatory penalty in question dually be conditioned on the size of an offender's business and the effect of such a penalty on that party's ability to continue in business. Subsequent to the June 3, 1972, violation, the government communicated by letter to LeBeouf that the Coast Guard intended to assess a penalty statutorily dictated by said offense based on the "size and stability of defendant's business." Movant argues that such an assessorial guage invidiously violates its right to equal protection of the laws since it falls with unequal weight on some offenders, and, accordingly, fails to pass constitutional muster. As a response, the government maintains that the policy of the Coast Guard consists of imposition of a penalty at or near the maximum ($10,000), an allegedly reasonable figure, unless justifiably mitigated by one or more of the three statutory considerations. The three factors which can justify an assessment of a lesser amount involve: (1) the size of the business of the owner or operator charged; (2) the effect that the penalty may have on the owner or operator's ability to continue in business; and (3) the gravity of the violation.

Alternatively, the government urges that any disparity which may

mate governmental purpose served by paragraph 5 save to reprimand the wrongdoer, by providing a pecuniary punishment, and, to deter others from illicitly discharging oil into the waterways.[12]

(Footnote 11 - continued from previous page)
exist among charged owners or operators of varying degrees of wealth clearly is justifiable to withstand constitutional scrutiny inasmuch as it is reasonably related to the prime objective of the WPCA legislation.

Based on the well-settled principle that decisions on constitutional issues should be avoided if the case can be decided on a non-constitutional ground, *see* Alexander v. Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1227, 31 L.Ed. 2d 536 (1972); Calhoun v. Cook, 487 F.2d 680, 683 (5th Cir. 1973); Mengelkoch v. Industrial Welfare Comm'n, 442 F.2d 1119, 1125 (9th Cir. 1971), the Court elects to reserve judgment on defendant's equal protection argument at this time in deference to the Court's classification of §1161(b)(5) as penal in nature. However, the Court acknowledges that such an equal protection claim must be examined in light of recent language by the Supreme Court upon reviewing purported discrimination on the basis of wealth. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 29, 93 S.Ct. 1278, 1294, 36 L.Ed. 2d 16 (1973). *But cf.* San Antonio Independent School District v. Rodriguez, 411 U.S. 70, 87-90, 102, n. 61,117, 93 S.Ct. 1315, 1324-1325, 1332, n. 61, 1340 (Marshall J., dissenting)

12. The mood of this country and the philosophy of a number of its congressional representatives with respect to the purity and quality of our national waterways is a factor not to be lightly heeded when examining paragraph 5. The WPCA, reviewed as a whole, meritoriously projects the need to protect the national environment and to promote the social welfare; however, the paragraph 5 sanction exists mainly, if not solely, to punish those who fail to abide by the regulatory provisions of the Act, and, not conversely, as an impetus to pragmatically and justly regulate users and handlers of petroleum. This section is not overshadowed by the general remedial tenor of the Act.

In classifying paragraph 5 as penal, two particularly noteworthy supportive indicia can be gleaned from the legislative history. One, the legislators' policy to "err on the side of strength." *See, e.g.,* 115 Cong. Rec. 9024 (remarks of Cong. Wright). Two, the legislative history of the WPCA is replete with allusions to the same single pair of major oil disasters, *The Torrey Canyon* off the coast of England, and the oil spill off the coast of Santa Barbara, California. *See, e.g.,* 115 Cong. Rec. 9016 (remarks of Cong. Fallon), *id.* at 9017 (Cong. Blatnik), *id.* at 9024 (Cong. Wright), *id.* at 9028 (Cong. Howard), *id.* at 9033 (Cong. Cleveland), *id. at 9034 (Cong. Miller),*id. at 9039 (Cong. Karth), *id.* at 9040 (Cong. Dingell), *id. at 9051 (Cong.* Fascell). Of course, such ca-

[2] As previously mentioned, accentuated by juxtaposition, the Court cannot overlook the active interplay that transpires between paragraphs 4 and 5. In view of the unique legal symbiosis that exists between the requirement under attack and its contiguous and preceding subsection, the Court is constrained to read and interpret these two paragraphs in para materiae. The prohibitions, operations, and end results of the two paragraphs are inextricably intertwined; this type of interlocking dependency, if allowed, would provide a circuitous, but nonetheless definite means of impairing and perhaps nullifying a potential offender's guarantee of statutory immunity. This in tandem situation entices, if not obligates, a party to report to the Coast Guard any violations of the Act, and, undoubtedly extracting the bulk of material and incriminating facts from this requisite disclosure, the Coast Guard automatically mulcts the determined sum against the self-admitted offender. To sanction this backdoor procedure ignores paragraph 4's explicit proscription against any usage of incriminatory data garnered through compelled self-disclosure; the monetary penalty lodged here against LeBeouf improperly was sustained upon information obtained via self-disclosure.[13]

(Footnote 12 - continued from previous page)
lamities do properly serve as the necessary catalysis in creating protective legislation, though it is seemingly harsh to judge everyday conduct in petroleum work operations by a few isolated acts in extremis.

13. From an overview of the Coast Guard's own guidelines, it is intuitively apparent that the agency's present modus operandi with respect to paragraph 5 penalties flagrantly violates the immunity granted in the preceding paragraph 4 of section 1161. To reiterate, the pertinent language of paragraph 4 reads: "Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in *any criminal case,* except a prosecution for perjury or for giving a false statement." (emphasis supplied) *See,* United States Coast Guard Commandant Instruction 5922.11A, reproduced and marked herein as Appendix A.

Automatic imposition of a paragraph 5 penalty assessed immediately

(Footnote 13 - continued on next page)

Hence, the Court finds that the procedure implemented in the instant case, ultilization of compelled admissions to support imposition of a criminal penalty, does not accommodate the statutory protection embodied in paragraph 4 of section 1161 of the WPCA, and, accordingly, this deficient procedure must be rejected.

[3] Although the Court has expended considerable commentary on the criminal-remedial dichotomy of section 1161, an equally, if not more significant area of analysis also must be examined. To the knowledge of the Court and assumably the litigants, these mutually dependent paragraphs, four and five, constitute sui generis legislation; that is, this statutory situation is the only determinable instance where Congress has coupled a punitive, albeit denominated "civil", sanction with a mandatory and criminally enforceable self-notification procedure (the constitutional validity of such procedure being protected by a statutory grant of immunity

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(Footnote 13 - continued from previous page)
after self-disclosure pursuant to paragraph 4 further suggests to this Court that said penalty is conferred in direct derogation of the principles of use and derivative use immunity, and likewise, is in conflict with the protective purpose of the immunity provision found in paragraph 4. *See,* Kastigar v. United States, 406 U.S. 441,92 S. Ct. 1653, 32 L.Ed.2d 212 (1972); Zicarelli v. New Jersey State Comm'n, 406 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972); United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1972). *Cf.,* Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964); Lees v. United States, 150 U.S. 476, 14 S.Ct. 163, 37 L.Ed. 1150 (1893); United States v. T/B CTCO 186-20 (S.D. Tex. 1974).

It is axiomatic, then, that once a defendant, such as LeBeouf, reports an oil spill, the prosecuting federal authorities have the burden of showing that their evidence is not tainted, and, to accomplish this, the government must establish that the evidence it proposed to use in support of the paragraph 5 penalty is derived from a source wholly independent of the compelled disclosure. *See,* Kastigar v. United States, *supra;* Zicarelli v. New Jersey State Comm'n, *supra. See generally,* Michigan v. Tucker, U.S. , , , n. 2, 94 S.Ct. 2357, 2361-2364, 2369, n.2, 41 L.Ed. 2d 182 (1974) (Brennan, J., concurring).

conterminous with that of the Fifth Amendment), with the latter procedure invariably triggering imposition of the punitive sanction. Regardless of how the Court classifies the paragraph 5 penalty, criminal or remedial, the result is the same: this type of statutory operation is impermissible. Otherwise, Congress would be able to accomplish indirectly what it cannot do directly – impose a penalty on an offender bottomed on information received through the required notification process. While the Court recognizes that certain civil pecuniary assessments, even though connoting punishment, are per se sound, *e.g.,* Rex Trailer Co. v. United States, 350 U.S. 148, 152, 76 S.Ct. 219, 100 L.Ed. 149 (1956), Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), none of these are initiated by a self-disclosure mandate. As exemplified in an aforementioned hypothetical situation[14] this two-fold procedure is subject to legislative abuse with respect to the traditionally criminal laws as well as other publicly obnoxious conduct in the sense that it provides a vehicle by which to totally circumvent the protective guarantees against self-incrimination under the Fifth Amendment or a grant of statutory immunity.

While the paragraph 5 proceeding is civil in form, it is, at minimum, quasi-criminal in nature since any penalty authorized pursuant to paragraph 5 is incurred by the commission of an offense against the law, namely, violation of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 407, 411. *See,* Boyd v. United States, *supra.* Barred from prosecuting an offender under the 1899 Rivers and Harbors Act due to the Fifth Amendment and the statutory immunity clause, *see,* United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1972), the government cannot then affix a monetary penalty founded upon the fruits of self-disclosure. Though the paragraph in question appears viscerally to deviate only in the slightest and mildest degree from a true remedial sanction, a deviation the Court earlier stated to be

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14. See footnote 8, *supra,* and accompanying text.

much broader, it markedly violates the protected domain against self-incrimination. To issue juridical approval over this procedure would signal a failure on the part of the Court to adhere to this constitutional and statutory protection. Moreover, were the Court to countenance this paragraph 5 mechanism, such approval presumably would provide the precedent for further piecemeal degradation of the party's protected right. As the Court in Boyd v. United States, 116 U.S. at 635, 6 S.Ct. at 535, observed:

> It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be *obsta principitis*. We have no doubt that the legislative body is activated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

The passage of time combined with increased usage has revealed the instant piece of legislation, as currently administered, to be well within the pale of the above quoted *Boyd* caveat. Accordingly, this Court would be derelict in its duty to protect the rights of the citizen before it if the Court were to sanction application of paragraph 5 of section 1161(b) of the WPCA as the government contends.

The government urges this Court to follow the rationale recently opined by the Supreme Court in One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972). *In One Lot*, the defendant, who previously had been acquitted to smuggling, pleaded this finding in bar of a forfeiture action by the government against the allegedly smuggled merchandise. Rejecting this argument, The Supreme Court noted that collateral estoppel would bar any proceedings to forfeit undeclared goods if, in earlier criminal proceedings, the elements of forfeiture had

been resolved against the government. The Supreme Court, however, held that the defendant's acquittal on the smuggling charge did not prohibit a subsequent action to forfeit goods allegedly smuggled since the acquittal on the criminal charge may have turned on a finding that the act was not done with the requisite intent. More specifically, the Court concluded that the forfeiture proceeding was a civil remedy rather than a criminal penalty, and therefore, its imposition was not barred by the earlier acquittal. Notwithstanding this conclusion, the present inquiry does not terminate because the factual and legal setting in *One Lot* visibly is distinguishable from the case before the Court. This Court does not question nor criticize the well-established Supreme Court pronouncements sanctioning forfeiture statutes as a supplement to criminal enactments, *see*, Calero-Toledo v. Pearson Yacht Leasing Co., U.S. , 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974),[15] and recognizing that Congress may impose both a criminal and a civil (perhaps, more properly styled non-criminal) sanction in respect to the same act or omission. *See*, Helvering v. Mitchell, *supra*. In the case cited by the government, the Supreme Court cogently pointed out the congressional intention to formulate corresponding but distinct criminal and non-criminal sanctions, whereas, by contrast, the government's argument in the instant case presupposes the existence of this legislative design. To the contrary, there is no clear legislative expression indicating that paragraphs 4 and 5 of section 1161 are penal and remedial respectively; rather, this Court, predicated on aforementioned observations, finds both of these to be disciplin-

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15. An historical insight into the origin, development, and usage of forfeiture statutes is found in Calero-Toledo v. Pearson Yacht Leasing Co., U.S. at , 94 S.Ct. at 2090.

Plainly, a significant distinction between *One Lot*, the forfeiture case upon which the government relies, and the case at bar is anchored on the fact that statutory forfeitures generally are enforced under the *in rem* procedure whereas the instant paragraph 5 penalty attaches *in personam*.

ary penalties intended to punish and deter, and it is this duplicity of criminal punishments that undoubtedly is denounced by the Court in *One Lot*. One significant difference which tends to stultify if not abrogate the parallelism between *One Lot* and this litigation that the government proffers is that the questioned monetary penalty of the forfeiture provision in *One Lot* serves to reimburse the government for investigative and enforcement expenses while its counterpart, the sanction lodged in paragraph 5 of the WPCA, is not addressed to any similar direct fiscal restitution,[16] although other provisions of the Act support avenues by which the government pointedly could recoup its outlays.[17] Another distinction rests upon the mandatory notification provision in the present case and the absence of a similar mandate in *One Lot*. Hence, it is inescapable that paragraph 5 only can be characterized as a punishment for the infraction of the law following a visceral determination by the Coast Guard of guilt based upon self-admission, since the provision neither contemplates restitution for damage nor reimbursement to the government for enforcement expenses.

[4] To recapitulate, the Court is of the opinion that the penalty mandated by paragraph 5 of Section 1161, United States Code, Title 33, is purely and simply criminal in nature. After adjudicating this penalty to be criminal and not regulatory, the Court, in light of the preceding paragraph 4 statu-

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16. Assuming, arguendo, that the government's position, that is, paragraph 5 provides operating revenue for §1161 - so it must be remedial, is correct, then the same rationale necessitates that paragraph 4, an undisputed penal sanction, be categorized as remedial since the result of subsection (k) channels all proceeds, regardless of their genesis, to the mainstream of operative cost. For the Court to rest its classification of the penalty at issue on this singular factor, as the government suggests, would be unrealistic. See footnote 5, *supra*, for the text of subsection (k).

17. *See* footnotes 3, 5, and 16, *supra*, and accompanying text.

tory immunity provision, necessarily must rule that the penalty under paragraph 5 only can be enforced if it is supported by information independently derived from the statutory self-disclosure compulsion in paragraph 4.[18] To rule otherwise would contravene the legislative privilege against self-incrimination afforded to the party who notified the government in compliance with paragraph 4. Inasmuch as the Court believes that the Coast Guard's principal, if not singular, source of evidence for the instant prosecution under paragraph 5 was derived from the defendant's compelled report in violation of the immunity provision of paragraph 4, the $2,500 penalty assessed against LeBeouf cannot stand.

Accordingly, it is ordered that the motion for summary judgment filed by the defendant, LeBeouf Brothers Towing Co., Inc., is hereby granted.

APPENDIX

UNITED STATES COAST GUARD
23 FEB 1973

COMMANDANT INSTRUCTION 5922.11A

Subj: Pollution Law Enforcement

1. *Purpose.* This instruction promulgates guidance for the assessment of civil penalties pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act (FWPCA).

2. *Cancellation.* Commandant Instruction 5922.11 is cancelled.

3. *Discussion.*

a. It is Coast Guard policy that every reported or dis-

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18. See footnote 10, *supra*, and accompanying text.

covered discharge of oil be investigated and that every discharge in violation of Section 311(b)(6) result in the assessment of a civil penalty.

b. In cases with extenuating circumstances, mitigation may be considered upon review and a compromise amount agreed upon. In those cases, the assessed penalty will become a matter of record as well as the compromise action taken.

c. In determining the amount of a penalty, only the factors set forth in the Act shall be considered. In this way, it is anticipated that the general level of penalties will be raised to a more meaningful level.

4. *Action.*

a. Enclosure (1) shall be used as the guideline for the assessment of a civil penalties pursuant to Section 311(b)(6), FWPCA.

b. Information contained herein is intended to be used in conjunction with the National Contingency Plan as implemented by COMDTINST 3020.3 series.

s/ J. D. McCann
J.D. McCANN
Acting Chief, Office of Marine
Environment and Systems

Encl: (1) Coast Guard policy for the application of Civil penalties under Section 311(b) (6), FWPCA
Enclosure (1) to COMDTINST 5922.11A
23 FEB 1973

COAST GUARD POLICY FOR THE APPLICATION OF CIVIL PENALTIES UNDER SECTION 311(b)(6), FWPCA

Consistent with the language of the Federal Water Pollu-

tion Control Act, Coast Guard policy requires the assessment of a civil penalty for each discharge of oil in violation of Section 311(b)(3). A maximum penalty of $5,000 is authorized by Section 311(b)(6); however, the drafters of the Act envisioned lesser penalties in certain circumstances. Section 311(b)(6) provides that, "In determining the amount of the penalty . . . the appropriateness of the penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered. . ." That is to say that the penalty might be less than $5,000 for a small business, for a business which would be forced out of operation by the maximum penalty, or for a violation of minor gravity. It should be noted, however, that these factors are not to be considered in determining whether a discharge should be investigated or whether a penalty should be assessed. The statute requires that a civil penalty be assessed for each violation of Section 311(b)(3). It is Coast Guard policy to assume that the penalty will be at or near the maximum unless a lesser penalty is clearly justified by one of the factors listed in Section 311(b)(6).

A number of considerations may be made in determining the gravity of a violation, such as the degree of culpability associated with the violation, the prior record of the responsible party, and the amount of oil discharged. Substantial intentional discharges should result in severe penalties, as should cases of gross negligence, and so on. This is not to suggest that other considerations may not combine to determine the gravity of a violation.

Two factors should not be considered in fixing the amount of a civil penalty: (1) the responsible party's removal effort or expense and (2) a decision by Federal and/or state authorities to bring criminal action for the same discharge. Liability for a civil penalty under Section 311(b)(6) attaches at the time of discharge. It is entirely unrelated to the subsequent removal responsibility for which the discharger must bear the

expense, either directly or by reimbursing the Pollution Fund. In no case may a responsible party avoid or reduce a civil penalty by removing the discharged oil. Federal or state criminal prosecutions for the same discharge do not affect the imposition or amount of a civil penalty. Criminal prosecutions are brought under separate authority such as the Refuse Act of 1899. They are neither intended as substitutes for civil penalties nor do they create a legal bar to subsequent civil penalties. Civil penalties should, therefore, be assessed for all violations of Section 311(b)(3) without regard to pending or anticipated criminal action.

APPENDIX F

MEMORANDUM OPINION OF U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Filed: March 21, 1974

UNITED STATES OF AMERICA,
Plaintiff

vs.

T/B CTCO 186-20, her tackle, apparel, furniture, etc. and T/B CTCO-185, her tackle, apparel, furniture, etc.,
Defendants

CIVIL ACTION
NO. 72-H-1443

Hon. Anthony J. P. Farris, United States Attorney, (Mr. Judson C. Gee and Ms. Helen M. Eversberg, Assistant United States Attorneys), Houston, Texas
Attorneys for the Plaintiff

Lemle, Kelleher, Kohlmeyer & Matthews (Thomas J. Grace), New Orleans, Louisiana; Brown and Teed (G. Byron Sims), Houston, Texas
Attorneys for the Defendants

MEMORANDUM OPINION

On the evening of April 25, 1972 a hose being used to dis-

charge crude oil from two barges owned and operated by Cenac Towing Company, T/B CTCO 186-20 and T/B CTCO 185, ruptured, releasing approximately thirty gallons of oil into the somewhat less than pristine waters of the Houston Ship Channel. In response to the incident the United States Attorney filed the instant suit for violation of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.§ 407.[1] The Government is seeking to recover a pecuniary penalty of no less than $500.00 and no more than $2,500.00 from the offending barges *in rem* as provided by 33 U.S.C.§§ 411 and 412.[2]

As its sole defense Cenac relies upon the notice and immunity provision of the Federal Water Pollution Control Act, 33 U.S.C. §1161(b)(4), recently recodified as § 1321(b)(5). This statute makes it incumbent upon any person in charge of a vessel to immediately notify the Coast Guard of any significant oil spill and provides that "Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case..."[3] Cenac's defense presents essentially two issues. First, was notice given by Cenac in compliance with the statute and were the facts upon which this suit is based obtained as a result of that notification. Second, does the prohibition against the use of information obtained in this manner "in any criminal case" extend to an action against a vessel *in rem* under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 412.

I. NOTIFICATION

This issue is primarily a factual one. The United States Coast Guard was notified of the oil spill immediately after it occurred, but the notice was not given directly by any employee of Cenac. The Coast Guard was contacted by

J. M. Hatcher, an employee of Shell Oil Company, the owner of the shore facility which was receiving the oil. Cenac contends that Hatcher was giving notice on behalf of both Cenac and Shell Oil and that, under the circumstances which prevailed on the evening in question, such notice complies with the requirements of 33 U.S.C. §1321(b)(5).

When the hose ruptured, tankerman M. P. Rhodes was the only Cenac employee on or near the barges. Rhodes testified that he immediately advised C. A. Davenport, the Shell Oil dockman working at the shore facility, of the situation and requested that Davenport shut off the valves on the shore tank and notify the Coast Guard. Davenport testified that Rhodes did indeed call his attention to the spill and request that the valves be closed, but he could not recall whether Rhodes specifically asked that the Coast Guard be notified. Davenport stated that he went aboard the barges; told Rhodes that the Coast Guard would have to be notified, and telephoned his supervisor, J. M. Hatcher, advising him of the incident. Davenport could not remember whether he asked Hatcher to notify the Coast Guard during their conversation, but he testified that he was certain Hatcher would make the notification since it is standard procedure for Shell Oil employees under the circumstances.

Hatcher, the Shell Oil supervisor, was able to shed little light on the situation. He stated that after receiving the call from Davenport he went to the dock and talked for a moment with Rhodes. After a short discussion he immediately telephoned the Coast Guard. Hatcher could remember telling Rhodes during their conversation that the Coast Guard would be notified, but he was uncertain as to whether Rhodes requested the notification. He also could not clearly recall whether Davenport had made any mention of notification in their earlier telephone conversation. Both Hatcher

and Davenport took the position that it is the policy of Shell Oil Company to notify the Coast Guard of all oil spills and that notification would have been made regardless of whether Rhodes had requested it not.

This Court finds that Rhodes did ask Davenport to notify the Coast Guard and that Hatcher was acting at least partially on behalf of Cenac when the notice was given. The Government has raised the question of whether, even under these facts, technical compliance with the statute was achieved since § 1321(b)(5) specifies that notice is to be given by "Any person in charge of a vessel..." and clearly Hatcher was not in charge of the barges in question.

Although Rhodes did not physically place the telephone call to the Coast Guard, he did discharge his duty of notification by acting through Davenport and Hatcher. The fact that Hatcher's motives were mixed when he made the call is not controlling. In the context of this case it is sufficient that Rhodes initiated the chain of events which led to the actual notification with a specific request that such notification be given.[4] Notice was given by a person in charge of the vessel within the meaning of 33 U.S.C. § 1321(b)(5). This Court further finds that the information upon which this Complaint is based was obtained solely by exploitation of this notification.

II. IMMUNITY.

The second point at issue, whether the instant *in rem* suit is a "criminal case" within the meaning of 33 U.S.C. § 1321 (b)(5), cannot be resolved so easily. It is apparently a question of first impression involving the inter-play between two significant water pollution statutes. Unquestionably 33 U.S.C. § 411 is a criminal provision and a prosecution under

it would have to be considered a criminal case. If the United States Attorney had sought to recover a fine of between $500.00 and $2,500.00 from Cenac by way of an information under § 411, facts gathered by virtue of the required notification could not have been used as evidence. *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972). The question is whether the United States Attorney may circumvent the immunity provision of §1321(b)(5) and impose the same penalty upon Cenac by simply filing a libel under §412 instead of an information under §411.

The little guidance which is available on this issue is found in *Mobil Oil Corp., supra.* There the Mobil Oil Corporation was being prosecuted under § 411 solely on the basis of information obtained through the required notification. Conceding that a prosecution under § 411 is a criminal case the Government argued that corporations should not be entitled to immunity since the immunity provision is designed to insulate the duty to report from constitutional objections and corporations enjoy no Fifth Amendment privilege. The Court of Appeals for the Fifth Circuit responded as follows:

> This argument ignores a second function of the immunity provision. Immunity insulates enforcement of the statutory duty from the operation of the constitutional privilege, but it also provides a valuable incentive for disclosure in the first instance. Thus, even where the constitution would permit the prosecution of a corporate owner on the basis of information the owner was compelled to disclose, the statute provides the assurance that the owner will not be harmed by incriminating evidence which the Government obtains by exploiting the mandatory notice. Thus the immunity provision encourages the owner to comply with his

> statutory duty. The provision is an essential feature of the statutory scheme. To preserve the provision to the full extent of its intended function, the scope of statutory immunity must be held to extend to all persons covered under § 1161, whether they enjoy the constitutional privilege or not. At 1128.

If Congress had been concerned exclusively with the constitutional privilege when the immunity provision was enacted, the Government's position that *in rem* suits under § 412 are not criminal cases might well be sustainable. Relying primarily on *United States v. U. S. Coin & Currency*, 401 U.S. 715, 28 L.Ed. 2d 434 (1971); *Lees v. United States*, 150 U. S. 476, 37 L.Ed. 1150 (1893); and *Boyd v. United States*, 116 U. S. 616, 29 L.Ed. 746 (1886), Cenac contends that the sanctions provided in § 412 are penal in nature and that *in rem* actions under that section should be considered criminal cases for all constitutional purposes. The Government takes issue with Cenac's theory that the sanctions are penal and argues that forfeiture actions of this nature have historically been classified as civil in procedural as well as constitutional contexts.[5]

Boyd is perhaps the most significant decision rendered to date on this issue. In *Boyd* the Supreme Court faced the question of whether a forfeiture proceeding under the Custom and Revenue laws of the United States was a criminal case under the Fourth and Fifth Amendments. The Court described the relevant portion of the Act as follows:

> It is declared by that section that any owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make or attempt to make

> any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and in addition to such fine, such merchandise shall be forfeited. At 617.

After a lengthy analysis of the problem the Court held that ". . .proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."[6] The Government suggests that *Boyd* is limited to situations where property is being forfeited by virtue of an offense committed by the owner and does not extend to statutes such as 33 U.S.C. § 412 which impose a penalty upon the vessel regardless of whether the vessel owner is in any way involved in a criminal enterprise.[7]

Whatever is wisdom, this distinction is present in *Boyd* and it has not been unequivocally abandoned in any subsequent decision dealing with forfeiture statutes. *Lees* cannot be taken to have extended Boyd since it involved statutes which contemplated the forfeiture of $1,000 by the person who committed the illegal act. In *United States Coin and Currency*, the Court was presented with a clear opportunity to extend *Boyd* to stautes similar to § 412 but did not do so.

The statute at issue in *U. S. Coin and Currency* was similar to 33 U.S.C. § 412 in that it anticipated, on its face, the forfeiture of property regardless of whether the owner had committed any criminal offense. The Government took the same position that it has taken here.

> The Government does not seriously contend otherwise. Instead it places great emphasis on the peculiar nature of the proceedings authorized under § 7302. Boyd, we are told, was only concerned with forfeitures which are imposed "by reason of offenses committed by" the owner. 116 U.S., at 634, 29 L. Ed. at 752. In the present action, however, the Government contends that the guilt of the owner of the money is irrelevant. The forfeiture statute, it is noted, simply authorizes confiscation of "any property intended for use in violating the provisions of the internal revenue laws"; it does not require that Angelini be the one who possessed the requisite intention. If, for example, Angelini had left the money in a bookmaker's office without having any reason to know that illegal activities would take place there, the Government reads the statute as permitting confiscation if it can be shown that the bookmaker used Angelini's money in illegal wagering activities. Since, under the Government's view, the guilt or innocence of the actual owner of the money is irrelevant in an action under § 7302, the Government urges that the present forfeiture should not be considered the result of a "criminal" proceeding for Fifth Amendment purposes. At 718, 719.

Instead of meeting the Government's argument head-on the Court seized upon a provision which permits the innocent owner of property forfeited under the customs and internal revenue laws to secure its return by proving his innocence to the Secretary of the Treasury. The existence of this provision persuaded the Court that the statute in question was aimed only at those significantly involved in a criminal enterprise, and that proceedings under it were criminal cases for Fifth Amendment purposes. Since there is no such return provision applicable to 33 U.S.C. § 412 this Court cannot accept *United States Coin and Currency* as direct authority that an action under §412 must necessarily be classified as criminal under the Fifth Amendment.

Thus as stated above, if Congress had been concerned only with the Fifth Amendment in granting immunity in "any criminal case," the Government's position in this suit might have some appeal. The most that can be said is that 33 U.S. C. § 412 is arguably a criminal case for constitutional purposes. When, however, the incentive function is thrown in the balance, it becomes more probable than not that Congress intended to grant immunity from this particular *in rem* action regardless of whether it has traditionally been classified as a Fifth Amendment criminal case. Otherwise any incentive the immunity promise might have vessel owners to report oil spills would be destroyed.

If information obtained through the required notification could be used to impose a virtually automatic penalty on the vessel under § 412, the promise of immunity from prosecution under §411 would provide no incentive to report whatsoever. Each time a spill occurred the owner or person in charge of the vessel would be faced with the choice of either reporting the spill and subjecting the vessel to an automatic penalty of as much as $2,500 or not reporting it and running the risk of prosecution under § 1321(b)(5). Where it is unlikely that the spill could be traced, the threat

of an almost certain penalty might well encourage silence.

It must be emphasized that a vessel will not now be able to secure immunity from any and all penalties by simply reporting an oil spill.[8] The conclusion here is limited to the peculiar situation presented by 33 U.S.C. §§411 and 412 and clearly does not extend to purely civil penalties having no connection with 33 U.S.C. § 411. This Court finds that §412 is a criminal case within the meaning of § 1321(b)(5) because it is arguably a criminal case in a constitutional sense and because its exclusion from §1321(b) (5) would conflict with one of the purposes of that provision as expressed in *Mobil Oil Co., supra* - to encourage the vessel owner to immediately notify the Coast Guard of all significant oil spills.

The Defendant will immediately prepare a judgment not inconsistent with this Memorandum Opinion and present it to the Government's attorney for approval as to form.

The Clerk will file this Memorandum Opinion and furnish counsel for all parties with true copies.

Done at Houston, Texas this 21st day of March, 1974.

s/ Woodrow Seale
United States District Judge

True copy I certify
Attest:
V. Bailey Thomas, Clerk
By: s/ L. Babin
Deputy Clerk

(SEAL)

FOOTNOTES

1. Section 407 provides in pertinent part:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit or cause, suffer, ot procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed. . . ."

Crude oil is considered "refuse" under this statute. *U.S. v. Standard Oil Co.*, 384 U.S. 224, 16 L. Ed. 2d 492 (1966).

2. 33 U.S.C. § 411.

"Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of

the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction."

33 U.S.C. §412:

"Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408 409, 411 to 416, 418, 502, 549, 686 and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. *And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title,* and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, *and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."*
(Emphasis supplied).

3. 33 U.S.C. §1321(b)(5):

"Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000,or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

4. It might be added that Rhodes reacted as any reasonable and prudent man would under the circumstances. He was alone on the barges and the nearest Cenac employees were at least one-quarter of a mile away on the TUG CHRISTINE. He was faced with the choice of either neglecting the spill and telephoning the Coast Guard himself from the shore facility, or remaining aboard and attempting to contain the spill while Davenport made the call. The second is the more reasonable and ecologically sound course of action.

5. See e.g. *Scow No. 36*, 144 Fed. 932 (1st Cir. 1906); *U.S. v. M/V Aktis*, C.A. No. 71-H-713 (S.D. Tex. 1972); *U.S. v. T/B NMS # 40*, 330 F. Supp. 781 (S.D. Tex. 1971); *U.S. v. M/V Kythnas*, 331 F. Supp. 311 (C.D. Calif. 1970); *Shipman v. U.S.*, 309 F. Supp. 441 (E.D. Va. 1970).

6. *Boyd, supra*, at 634, 635.

7. *U.S. v. M/V Martin*, 313 F. 2d 851 (7th Cir. 1963); *The President Coolidge*, 101 F. 2d 638 (9th Cir. 1939); *U.S. v. The Terry E. Buchanon*, Etc., 138 F. Supp. 754 (S.D. N.Y. 1956); *U.S. v. The Republic No. 2, Et Al.*, 64 F. Supp. 373 (S.D. Tex. 1946).

8. The civil penalty provided in 33 U.S.C. § 1321(b) (6) will not be affected by this decision.

> (6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

Moreover, removal costs can be recovered from the vessel owner pursuant to 33 U.S.C. § 1321(f).

APPENDIX G

FINAL DECREE

Filed: May 16, 1974

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

VS. CIVIL ACTION NO. 72-H-1443

T/B CTCO 186-20, HER TACKLE,
APPAREL, FURNITURE, ETC. AND
T/B CTCO-185, HER TACKLE, APPAREL
FURNITURE, ETC.

FINAL DECREE

This action having come on for trial before the Court, Honorable Woodrow Seals, District Judge, presiding, and the issues having been tried and a decision having been duly rendered;

IT IS ORDERED, ADJUDGED, AND DECREED that the plaintiff, United States of America, take nothing, that the action be dismissed on the merits, and that the defendants, T/B CTCO 186-20, her tackle, apparel, furniture, etc., and T/B CTCO-185, her tackle, apparel, furniture, etc., recover from the plaintiff, United States of America, their costs in this action.

Houston, Texas, this 16th day of May, 1974.

S/ Woodrow Seals
UNITED STATES DISTRICT
JUDGE

APPROVED AS TO FORM:

ANTHONY J. P. FARRIS
UNITED STATES ATTORNEY

By: s/ Judson C. Gee
JUDSON C. GEE
ASSISTANT UNITED STATES ATTORNEY

By: s/ HELEN M. EVERSBERG
HELEN M. EVERSBERG
ASSISTANT UNITED STATES ATTORNEY

LEMLE, KELLEHER, KOHLMEYER & MATTHEWS

By: s/ Thomas J. Grace
THOMAS J. GRACE
ATTORNEYS FOR DEFENDANTS

BROWN & TEED

By: s/ G. Byron Sims
G. BYRON SIMS
ATTORNEYS FOR DEFENDANTS